

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(Reported by C. ROBINSON, Esq., Q.C., Reporter to the Court.)

THE CORPORATION OF THE COUNTY OF LINCOLN
v. THE CORPORATION OF THE TOWN OF NIAGARA.

By-Law—Equalization of Rates—C. S. U. C. ch. 54, secs. 28-32, 70, 73.

Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by the defendants of the proportion to be raised by them. *Plea*, that in capitalizing the real property not actually rented but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D. and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby \$1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up.

Held, on demurrer a good defence, for such capitalization was contrary to the statute, and though it lessened the defendants' assessment they were not precluded from objecting for the plaintiffs could only create a debt by complying with the act. *Held*, also, that it was unnecessary to quash the by-law, for the court in their discretion might decline to do that, though they could not deny the defendants' right to contest their liability on any legal ground.

[Q. B., T. T., 30 Vic. 1866.]

The declaration contained two counts. The first set out a by-law passed by the plaintiffs on the 27th of May, 1863, which recited, among other things, that it was necessary to raise \$8,865, for general purposes for the current year, and enacted, that such sum should be levied and collected upon all the ratable property in the county, and should be apportioned among the several municipalities therein, according to a schedule set forth, in which the proportion to be paid by the town of Niagara was \$588; that the plaintiffs by the said by-law required the defendants to raise, levy, and pay over to the plaintiffs, within the year 1863, such sum of \$588. Averment of notice to the defendants, and that the clerk of the peace did before the 1st of August, 1863, certify to the clerk of the defendants the total amount directed to be levied in the town of Niagara for that year for county purposes. Breach, non-payment of that sum.

The second count set forth a similar by-law passed in 1864, reciting the necessity of raising \$11,291, and stating the proportion to be paid by the town of Niagara at \$479 for that year for county purposes; and after similar averments, concluded with a similar breach.

Plea—To the first count—that before the passing of the said by-law in the first count mentioned, the said plaintiffs, in capitalizing for the purpose of assessment for the year 1863 the real property not actually rented but held and occupied by the owners thereof in the towns of St. Catharines and Niagara, and in the village of Port Dalhousie, municipalities of the said County of Lincoln, and also in capitalizing the ratable personal property for the said year 1863, in the said towns and village, capitalized the same at ten per cent instead of at six per cent, as directed by law, and that in making the said apportionment in the said by-law among the townships of the said county and the said towns and village, the said plaintiffs made such apportionment upon the said capitalization of ten per cent herein mentioned, whereby the large sum of

money of one million dollars was omitted from the amount of the said capitalization, and the aggregate value of the ratable property of the said town of Niagara was thereby wrongly and illegally made up by the said plaintiffs, and the amount by the said by-law directed to be raised and levied as the ratable property of the said town of Niagara was also erroneously and illegally made up in the said apportionment, and was another and different amount than the amount should and would have been if the plaintiffs had capitalized the said real and personal property in the said towns and village at six per cent, directed and authorized by law—whereby the defendants say that they have incurred no liability to the plaintiffs under the said by-law as in said first count alleged.

Similar plea, *mutatis mutandis*, to the second count.

Demurrer, on the grounds—1. That the facts stated in the said pleas would not, if true, render the said by-laws invalid or illegal.

2. That the mode adopted by the plaintiffs in capitalizing the ratable property of the said towns and apportioning the same, the amount to be levied and raised by the defendants would be much less than if the said real and personal property had been capitalized at six per cent., and it does not lie with the defendants to make the objection.

3. That the defendants should have moved to quash the said by-law, and cannot take the objections by way of plea.

4. That if the defendants were damaged by the said mode of capitalizing, it should have been shown and pleaded by way of equitable plea.

W. Eccles and Robert A. Harrison, for the demurrer, cited *Fisher v. The Municipal Council of Vaughan*, 10 U. C. Q. B. 492; *Gibson and the Corporation of Huron and Bruce*, 20 U. C. Q. B. 120; *Secord and the Corporation of Lincoln*, 24 U. C. Q. B. 142; *Consol Stat U. C. ch. 54, secs. 10, 19, 28, 29, 32, 70, 71, 73, 75, 76, 77*.

J. H. Cameron, Q. C., contra.

DRAPER, C. J., delivered the judgment of the court.

The defence set up to the declaration is in effect that the amount claimed by the plaintiffs by each of these by laws has not been legally arrived at according to the directions of the Assessment Act, by which both parties are bound: that as to real property not actually rented, but held and occupied by the owners, as well as to personal property generally, it was "capitalized" at ten per cent instead of six, upon its annual value, whereby a sum of \$1,000,000 has been omitted from the proper aggregate valuation of all the property in the county liable to be rated and assessed: that the aggregate value of the ratable property in the town of Niagara was illegally made, and the sum of money directed by the by-law to be raised was illegally arrived at (i. e., not according to the statute) and was different from what it would have been if the plaintiffs had capitalized the real and personal property in the towns and incorporated villages in the county at six per cent. And on this ground the defendants say they have not become indebted to the plaintiffs, for a debt of the nature claimed could only be created in the manner and form prescribed by the Assessment Act.